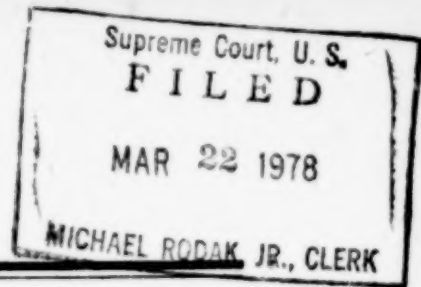


No. 77-1013



In the Supreme Court of the United States

OCTOBER TERM, 1977

VINCENT PUGLISI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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Petitioners, retired regular military officers now holding civilian positions with the federal government (Pet. App. 2a), contend that the Dual Compensation Act of 1964, as amended, 5 U.S.C. 5531-5534, violates the equal protection component of the Due Process Clause by treating them differently from retired reserve military officers.

1. The Dual Compensation Act of 1964 is the most recent of a series of statutes restricting retired military officers from holding "dual" offices or receiving "dual" salaries from the federal government. The policy against dual compensation was first established in the Dual Office Act of 1894, 28 Stat. 162, 205, which provided that no one holding "an office" paying \$2,500 or more annually could be appointed to any other federal office. Under that statute retired regular officers were deemed current office-holders and thus subject to the restriction; retired reserve

officers were not. See *Hostinsky v. United States*, 292 F. 2d 508, 510 (Ct. Cl.); *Pack v. United States*, 41 Ct. Cl. 414.

The dual compensation and employment restrictions were altered in the Economy Act of 1932, 47 Stat. 382, 406, which allowed certain retired commissioned officers, left uncovered by the still standing 1894 Act,¹ to accept civilian posts with the federal government but limited their total annual compensation to \$3,000.² The 1932 Act expressly excepted, *inter alia*, retired reserve officers.

The 1964 Act, which established a uniform rule (see Pet. App. 7a), for the most part relaxed the restrictions against dual office holding by retired regular military officers. Retired regular officers now may obtain and receive full salary for civilian federal employment, subject only to the condition that their military retirement pay "shall be reduced to an annual rate equal to the first \$2,000 of the retired or retirement pay plus one-half of the remainder, if any." 5 U.S.C. 5532(b). The 1964 Act continues in effect the previous rule exempting retired reserve officers from the dual employment and pay restrictions; the retirement pay of reserve officers is not reduced if they hold civilian federal employment. 5 U.S.C. 5532(c), 5534.

The Court of Claims rejected petitioners' contention that the Dual Compensation Act is unconstitutional (564

¹The 1894 Act was not repealed with the passage of the Economy Act of 1932 and, as a result, the two statutes were concurrently applied until passage of the 1964 Act. Because the terms of the earlier statute were more restrictive and applied to many of the same officers as the 1932 statute, the only group of retired military personnel actually affected by the 1932 Act were "Regular and temporary commissioned officers retired for noncombat physical disability." S. Rep. No. 935, 88th Cong., 2d Sess. 3 (1964).

²This limit was raised to \$10,000 in 1955. 69 Stat. 498.

F. 2d 403; Pet. App. 2a-17a). Scrutinizing the statute according to the "rational basis" test (Pet. App. 10a-11a), the court found that the distinction between regular and reserve retired officers is justified because "regular officers can normally serve longer and receive significantly higher retirement pay than reserve officers" (*id.* at 12a). The court found a second justification in the fact that a regular retired military officer "continues at all times to hold an office in the military [and] is already a federal officeholder" (*id.* at 13a), while a retired reserve officer "can be ordered to active duty only in time of war or national emergency after all active reservists have been called" (*ibid.*).

2. The decision of the Court of Claims is correct. There is no conflict among the circuits on the question presented here, which does not warrant review by this Court.

Petitioners recognize (Pet. 6-7) that Congress may constitutionally limit the dual compensation of retired regular military officers without limiting compensation of retired reserve officers so long as a rational basis for the distinction exists. See *Alexander v. Fioto*, 430 U.S. 634; *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307; *McGowan v. Maryland*, 366 U.S. 420, 425. Cf. *Johnson v. Robison*, 415 U.S. 361, 374-383. As the Court of Claims determined (Pet. App. 11a-13a), there are at least two legitimate bases for the distinction drawn by the 1964 Act.

One of Congress' primary purposes in passing the Dual Compensation Act and its predecessors was "to limit the total government compensation receivable by any one person * * *" (Pet. App. 13a). Yet, as one Congressman noted during debate on the 1964 Act, "[t]he Regular officers do receive more advancement in their term of service and are allowed to go on for 30 years and receive 75 percent of their base pay [upon retirement] when the vast majority of Reserve officers must [under military

regulations] retire at the end of 20 years and receive 50 percent of their base pay and do this at an earlier stage of life when they still have children in school * * *." Remarks of Rep. Broyhill, 110 Cong. Rec. 3018 (1964) (emphasis added). Thus, in applying the pay reduction rule of 5 U.S.C. 5532 to retired regular officers with federal civilian positions, Congress logically acted "with a view toward bringing their total compensation more in line with that of retired reserve officers in such civilian positions" (Pet. App. 13a). Although there may be a few instances, as petitioners suggest (Pet. 6-8), where a retired reservist draws greater total compensation than a similarly situated retired regular officer under this formula, a "classification * * * does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78." *Dandridge v. Williams*, 397 U.S. 471, 485. Congress may act on the basis of the characteristics of a group as a whole, and a statute need not require case-by-case decisions in order to be rational. *Califano v. Jobst*, No. 76-880, decided November 8, 1977, slip op. 5-6.

A second purpose of the Dual Compensation Act of 1964, carried forward from the Dual Office Act of 1894, is to restrict and regulate dual federal officeholding *per se*. As the Court of Claims observed, a regular officer who has retired still "continues at all times to hold an office in the military," with its attendant rights and obligations, and never sheds his status as "a federal officeholder" (Pet. App. 13a). A reserve officer, on the other hand, historically has been regarded as discarding his status as a federal officeholder on retirement. *Hostinsky v. United States*, *supra*. It is entirely reasonable for Congress to take this distinction into account in deciding to exempt retired reserve officers from the fiscal limitations on dual office holding.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.